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19-P-992 Appeals Court

COMMONWEALTH vs. ZAHKUAN SWEETING-BAILEY.[1]

No. 19-P-992.

Bristol. March 13, 2020. - December 2, 2020.

Present: Green, C.J., Vuono, Rubin, Maldonado, & Shin, JJ.[2]

Firearms. Search and Seizure, Motor vehicle, Protective frisk, Reasonable suspicion, Threshold police inquiry. Constitutional Law, Reasonable suspicion, Stop and frisk. Practice, Criminal, Motion to suppress.

Indictments found and returned in the Superior Court Department on March 15, 2018.

A pretrial motion to suppress evidence was heard by Raffi N. Yessayan, J., and a conditional plea was accepted by him.

Elaine Fronhofer for the defendant.

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[1] In conformity with our custom, we spell the defendant's name as it appears in the indictments.

[2] This case was initially heard by a panel comprised of Justices Rubin, Maldonado, and Shin. After circulation of a majority and a dissenting opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Green and Justice Vuono. See Sciaba Constr. Corp. v. Boston, 35 Mass. App. Ct. 181, 181 n.2 (1993).

Daniel J. Walsh, Assistant District Attorney, for the Commonwealth.

RUBIN, J. The defendant, Zahkuan Sweeting-Bailey, entered a guilty plea (conditioned on his right to pursue an appeal from the order denying his motion to suppress) to one count of unlawful possession of a large capacity firearm, in violation of G. L. c. 269, § 10 (m), and one count of carrying a firearm without a license, in violation of G. L. c. 269, 10 (a).[3] Prior to the plea, the defendant had filed and litigated a motion to suppress the firearm, alleging that both an exit order from a vehicle and a subsequent patfrisk were invalid. The motion was denied after hearing, and this appeal timely followed. We affirm.

Factual background. The following facts were found by the judge, who issued findings from the bench, supplemented where noted by facts testified to by police witnesses, all of whom were found by the judge to be "credible in all relevant respects."

The defendant was a back seat passenger in a vehicle that police validly stopped for a traffic violation. The vehicle,

[3] In addition, nolle prosequis were entered on charges of unlawful possession of a large capacity firearm, see G. L. c. 269, § 10 (m), and carrying a loaded firearm without a license, see G. L. c. 269, § 10 (n).

containing a driver, the defendant, and two other passengers, came to a stop without incident in a parking lot. Once the vehicle stopped, the front seat passenger, Raekwan Paris, known to the police to be a member of the United Front Gang in New Bedford and of the Bloods, and to have previously been arrested for having a gun in a motor vehicle, exited the car.

This was the fourth time that Paris had been involved in a police stop. On two of those occasions, Paris had been fully cooperative and no gun was recovered. On another occasion, while still being cooperative, Paris was stopped while walking away from the vehicle. A firearm (which resulted in Paris's firearm conviction) was recovered from the vehicle from which he was observed walking away.

Having exited the car, Paris immediately became "combative" with the police, questioning the reason for the stop and complaining of harassment. Paris refused several commands to return to the vehicle and at one point took a fighting stance, as if ready to punch the officers. Meanwhile, the three remaining vehicle occupants -- the driver, the defendant, and one other passenger -- remained seated. The officers made no observations of any movements, gestures, or nervousness. They pat frisked and handcuffed Paris, and ordered the other occupants to exit the vehicle. They complied without incident.

The two back seat passengers (the defendant and one other) were both known to the police. They knew the defendant also was a member of the Bloods and that he had been found delinquent as a juvenile for a firearm offense. The other back seat passenger was known by police to be a member of a gang in a neighboring city and to have been seen on a video posted to the video sharing Web site YouTube in possession of what appeared to be a genuine firearm. The officers pat frisked each of the other three car occupants, and recovered the subject firearm from the defendant's person.

Discussion. "When reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" (quotation and citation omitted). Commonwealth v. Almonor, 482 Mass. 35, 40 (2019).

1. Exit order. We turn first to the exit order. The standard for an exit order in Massachusetts is well settled. See Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020); Commonwealth v. Barreto, 483 Mass. 716, 722 (2019). The Supreme Judicial Court has made it clear that reasonable suspicion that an occupant or occupants of a vehicle are armed is not a necessary predicate for a valid exit order. Torres-Pagan, supra at 38-39. Rather, an exit order is valid when, among other

reasons, "police are warranted in the belief that the safety of the officers or others is threatened." Id. at 38. When reviewing an exit order, "we ask 'whether a reasonably prudent [person] in the [officer's] position would be warranted in the belief that the safety of the police or that of other persons was in danger.'" Commonwealth v. Santana, 420 Mass. 205, 212-213 (1995), quoting Commonwealth v. Almeida, 373 Mass. 266, 271 (1977). "[I]t does not take much for a police officer to establish a reasonable basis to justify an exit order . . . based on safety concerns, and, if the basis is there, a court will uphold the order." Commonwealth v. Gonsalves, 429 Mass. 658, 664 (1999).

Here, we have little doubt that Paris's combative behavior and threatening stance with the police raised such safety concerns. Paris directly confronted the officers and assumed a fighting stance with clenched fists -- which reasonably suggested that Paris was going to "throw a punch." The officers were also slightly outnumbered. See, e.g., Commonwealth v. Feyenord, 445 Mass. 72, 76 (2005) (exit order justified partly because occupants outnumbered officer). There were three police officers and, including Paris, four vehicle occupants -- one of whom still possessed control over the vehicle's movement. See Torres-Pagan, 484 at 37 n.4 (reasonable fear that vehicle could be used as weapon will justify exit order). "[P]olice officers

conducting a threshold inquiry may take reasonable precautions . . . when the circumstances give rise to legitimate safety concerns." Commonwealth v. Haskell, 438 Mass. 790, 794 (2003). "The [United States] Constitution does not require officers 'to gamble with their personal safety'" (citation omitted). Id. Accordingly, on all the facts and circumstances, we conclude the exit order was appropriate.

2. Patfrisk. To justify a patfrisk, "an officer needs more than safety concerns." Torres-Pagan, 484 Mass. at 37. The standard is more stringent. See id. at 39 ("Having different standards for exit orders and patfrisks makes logical sense. . . . [A]n exit order is considerably less intrusive than a patfrisk"). It is not enough for police to have a generalized safety concern. See id. at 38 ("A lawful patfrisk, however, requires more"). Rather, to justify a patfrisk, police must have a "reasonable suspicion" based on articulable facts, "that the suspect is dangerous and has a weapon." Id. at 39.[4]

[4] The dissent states that the judge conflated the test for an exit order and the test for a patfrisk. Post at . Although, because our application of the law to the facts is de novo, this is ultimately irrelevant, the judge's conclusions of law, issued from the bench, are not clear on the point. The judge found that there was reasonable suspicion that there was a firearm in the car and, before finding the patfrisk justified, he repeatedly referred to the firearm history of both the defendant and the other back seat passenger. Torres-Pagan, released after the within motion was decided, did not announce anything new; that a patfrisk is justified only where there is reasonable suspicion that an individual is armed and dangerous

We think the patfrisk was justified under this standard. In all the previous police encounters with Paris, he had been cooperative. Indeed, in a previous motor vehicle stop that had led to Paris's arrest for possession of a firearm found in the vehicle, Paris had gotten out of the car and started to walk away, but was cooperative when ordered back to the car. On this day, though, Paris got out of the vehicle, was combative, would not obey orders to return to the vehicle, behaved in a frenetic manner, and would not calm down.

As the judge found, particularly after the police pat frisked Paris and found nothing, it was reasonable for the officers to believe -- though not by any means with certainty -- that Paris was trying to distract the officers from the vehicle because it contained contraband, specifically, given the history of all the passengers, a firearm. In particular, the facts and circumstances supported reasonable suspicion that a firearm would be found in the car, either loose, or on the person of Paris's fellow Bloods member, the defendant, a passenger

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was a central holding in Terry v. Ohio, 392 U.S. 1, 30 (1968), and has been repeated often by our appellate courts throughout the years since then. See, e.g., Commonwealth v. Narcisse, 457 Mass. 1, 7 (2010). In the fifty-two years since Terry, a mere fear for officer safety, see post at , has never been enough to support a patfrisk of an individual's person. Torres-Pagan merely made clear that some loose language on the matter in prior opinions had not altered that.

previously adjudicated delinquent for an offense involving use of a firearm. (Given the posture of the case, whether there was a basis for a reasonable belief a firearm might have been found on the person of the other back seat passenger or the driver is not before us.) "While gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality of the circumstances they confront and must assess." Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841 (2010). It is reasonable to think that a gang member might act to protect a fellow gang member from arrest and thus, given the circumstances known to the police, it was reasonable to suspect that the item from which Paris was trying to distract the police could be found not only in the car, but on the defendant's person.

Although our dissenting colleagues state that "we cannot view the defendant's actions in isolation from Paris's behavior," their analysis essentially ignores that behavior. The dissent asserts that the defendant's "mere presence in the same car as Paris, however, was insufficient to justify a patfrisk of him," and that "the defendant did exactly what is

asked of those stopped by police[, sitting] calmly and compl[ying] with police instructions." Post at .

Those statements are true, but they do not address all the circumstances here. The question is whether there was reasonable suspicion based on articulable facts that the defendant, sitting in the car, was in possession of a firearm. Given the defendant's membership in the same gang as Paris, and the defendant's own history of crime involving a firearm, in light of Paris's conduct and history, there was. And, because our determination necessarily rests on Paris's unusual and combative behavior, his history, and his relationship with the defendant, our decision does not, as the dissent suggests, "exclude gang members with any prior firearm involvement from the reasonable suspicion requirement established by Terry v. Ohio, 392 U.S. 1, 30 (1968), and its progeny." Post at .

Because, taken together, all the facts and circumstances here supported a reasonable belief based on articulable facts that the defendant was armed and dangerous, the motion to suppress was properly denied.

Order denying motion to suppress affirmed.

MALDONADO, J. (dissenting, with whom Shin, J., joins). I respectfully dissent because I do not believe that we can impute, from a gang member's uncharacteristic behavior during a motor vehicle stop, reasonable suspicion to believe that a fellow gang member, who did nothing more than sit calmly and quietly and cooperate with police, was armed and dangerous.

In Commonwealth v. Torres-Pagan, 484 Mass. 34, 39 (2020), the Supreme Judicial Court made clear that, while concern for officer safety is sufficient to justify an exit order, "[a] lawful pat frisk . . . requires more." Id. at 38. The court reasoned that, "[h]aving different standards for exit orders and patfrisks makes logical sense" because "an exit order is considerably less intrusive than a patfrisk" (quotation omitted). Id. at 39. Thus, to justify a patfrisk, police must have a "reasonable suspicion that the suspect is dangerous and has a weapon." Id.

Without the benefit of Torres-Pagan, the judge concluded that both the exit order to, and the patfrisk of, the defendant were lawful because Paris's conduct raised legitimate safety concerns. The judge based his determination on the officers' belief that Paris's behavior gave rise to an inference that he was distracting police from discovering a weapon in the car. While I believe that inference is attenuated, I do not dispute that Paris's combative behavior, in the circumstances,

sufficiently justified an exit order. But I do not agree that such uncharacteristic behavior gave rise to a reasonable suspicion of there being a gun in the car or on the person of the defendant, and the judge did not so find.[1]

The majority, pointing to nothing the defendant said or did in the course of the motor vehicle stop that evening, but based on his association with Paris as a member of the Bloods, a three year old juvenile delinquency finding on a firearm offense, and Paris's combative behavior, concludes that the patfrisk of the defendant was justified. Although we cannot view the defendant's actions in isolation from Paris's behavior, the defendant's mere presence in the same car as Paris, however, was insufficient to justify a patfrisk of him (the defendant). Cf. Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("person's mere

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[1] It is clear from the judge's decision that the only conclusion he drew from Paris's actions was that they created sufficient officer safety concerns to justify the minimal intrusion of an exit order. Then, without the benefit of Torres-Pagan, the judge assumed that the same concerns validated the patfrisk. The judge did not conclude that Paris's actions gave rise to a reasonable suspicion to search the vehicle for weapons, and the Commonwealth does not so argue on appeal. Nor would such an argument be tenable. See Torres-Pagan, 484 Mass. at 40 ("surprise in response to unexpected behavior is not the same as suspicion"). In any event, any reasonable suspicion to search the car would not have automatically extended to the defendant's person. "A person is not a container" for purposes of an automobile search. Commonwealth v. Griffin, 79 Mass. App. Ct. 124, 128 (2011), citing Wyoming v. Houghton, 526 U.S. 295, 308 (1999) (Breyer, J., concurring).

propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person"); United States v. Di Re, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled"). Likewise, that the defendant was a known gang member in the company of another gang member, and was adjudicated delinquent as a juvenile on a firearm offense several years earlier, were also insufficient to justify his patfrisk. See Commonwealth v. Pierre P., 53 Mass. App. Ct. 215, 216, 217 (2001) (high crime area and fact that some individuals were gang affiliated did not justify patfrisk). Cf. Commonwealth v. Cordero, 477 Mass. 237, 246 (2017) ("the defendant's prior convictions, without further specific and articulable facts indicating that criminal activity was afoot, could not create reasonable suspicion").

Concluding otherwise, the majority relies, as did the judge, on Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841 (2010), for the proposition that gang membership can be considered as part of the totality of the circumstances in a reasonable suspicion inquiry. I do not quarrel with that general proposition; however, Elysee concerned the validity of an exit order, and the judge here relied on it for that precise purpose. With jurisprudential guidance, the judge

understandably equated the justification necessary for the exit order with the justification required for the patfrisk. See Torres-Pagan, 484 Mass. at 38 ("we mistakenly have described a patfrisk as being constitutionally justified when an officer reasonably fears for his own safety" [quotation and citation omitted]).

We now know, however, that a reasonable fear of officer safety is not enough to justify the greater personal intrusion of a patfrisk. See Torres-Pagan, 484 Mass. at 39 ("a patfrisk . . . is a severe . . . intrusion upon cherished personal security" [quotation and citation omitted]). With this distinction clarified, therefore, the inquiry before us is whether the patfrisk was independently supported by a reasonable suspicion to believe the defendant was armed and dangerous. Id. Nothing the defendant said or did supports such a conclusion, and any reliance on Elysee in support of a contrary view is misplaced.

Putting aside that Elysee did not involve the validity of a patfrisk, it is also factually distinguishable because there, police had observed the occupants engage in movements consistent with the concealment of a weapon. See Elysee, 77 Mass. App. Ct. at 842. Conversely, no such similar observations were made of the driver or the back seat passengers here. Rather, in this case, the defendant exhibited no suspicious behavior in the

course of the stop. He did not make any furtive gestures from which to infer that he concealed a weapon. See Commonwealth v. Villagran, 477 Mass. 711, 718 (2017) (no "reasonable belief that the defendant was armed and dangerous where the defendant was compliant and did not make any furtive gestures or reach into his pockets in a manner that would suggest that he was carrying a weapon"). He did not bend down or make any movements from which to infer that he was attempting to reach for a weapon. See Torres-Pagan, 484 Mass. at 40 (patfrisk not justified where defendant made no movements suggesting he was armed and dangerous). He did not display any signs of nervousness. Cf. Commonwealth v. Brown, 75 Mass. App. Ct. 528, 533 (2009) ("Suppression is appropriately denied where, in addition to the defendant's nervous appearance, other factors exist, including in particular police observation of a furtive gesture"). And the defendant did not engage in any verbal or nonverbal communication with Paris from which to infer that he jointly possessed a weapon with Paris.

In short, the defendant did exactly what is asked of those stopped by police. He sat calmly and complied with police instructions. While acknowledging these facts, the majority surmises that a gang member might act to protect a fellow gang member and so it is reasonable to suspect that Paris's behavior and complaints of harassment were designed to distract the

police from a firearm that was on the person of the defendant, specifically. This is too great an inferential leap, and it is neither supported by the testimony or the judge's findings, nor argued by the Commonwealth. Indeed, the officers also pat frisked the female driver, who had no known gang affiliation or prior weapons involvement.

In the absence, therefore, of any evidence that the defendant engaged in suspicious behavior or activity, his past firearm involvement as a juvenile and gang association with Paris did not alone create a reasonable suspicion that the defendant was armed and dangerous.[2] To hold otherwise would, in effect, exclude gang members with any prior firearm involvement from the reasonable suspicion requirement established by Terry v. Ohio, 392 Mass. 1, 30 (1968), and its progeny.

[2] We recognize that "[t]he subjective intentions of police are irrelevant so long as their actions were objectively reasonable." Commonwealth v. Cruz, 459 Mass. 459, 462 n.7 (2011). Nevertheless, it is worth noting that all three officers indicated that, but for Paris's actions, they would not have even removed the defendant from the vehicle. Thus, based on the defendant's actions alone, even multiple police officers did not suspect that he was armed and dangerous.